

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**



75-1237

B  
P/S

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA,

Docket #75-1237

-against-

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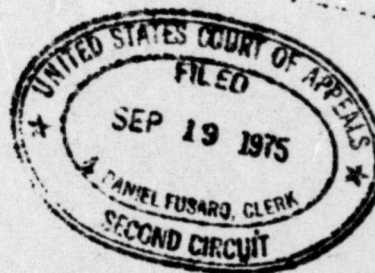
WILLIAM DREW,

Appellant-Defendant.

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REPLY BRIEF OF APPELLANT WILLIAM DREW



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UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA,

: Docket #75-1237

-against-

WILLIAM DREW,

Appellant-Defendant. :

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REPLY BRIEF OF APPELLANT  
DREW

This brief is submitted in reply to the answering brief of the government.

The Court is reminded that at page 35 of its answering brief, the United States Attorney specifically concedes that the evidence against William Drew on Counts Seven through Twelve inclusive was insufficient as a matter of law.

However, for some strange reason, the government is unwilling to make the same concession as to Count Thirteen. However, Count Thirteen is no different in substance from Counts Seven through Twelve, as it applies to the defendant Drew, and should meet a similar fate.

Count Thirteen charges a sale by the defendant Peter Horvat utilizing



the brokerage facilities of his firm, Baron & Co. See page 4 of the government's Bill of Particulars, a copy of which is to be found at appendix page 2a of the initial ~~xxix~~ of the appellant Drew. Furthermore, page 29 of the government's brief recites its evidence as against the defendant Horvat, which includes the transaction embodied in Count Thirteen. The government brief at page 29 recites that Horvat assisted his employer, Robin Baron, the principal of Baron & Co., in the sales specifically charged to Horvat.

The sales for which Drew may have responsibility deal with those executed through the facilities of Ridgway McCleod & Co., which sales originated in Van Aken's apartment. There is absolutely no connection at all between the selling activities of Horvat and the selling activities of Drew, or any one else associated in any way with Ridgway McLeod & Co. As such Count Thirteen suffers from the same defects as does Counts Seven through Twelve, and should be reversed and dismissed.

#### THE PRIOR GRAND JURY TESTIMONY ISSUE

The government's reliance upon the opinion of this Court in United States v. Gonzalez-Carta 419 F2d 548, 552 (1969), with regard to the issue of the prior grand jury testimony of Orpheus, as substantive evidence as

against Drew, is just not dispositive of the issue posed by Drew.

In Gonzalez-Carta, the witness in question was called by the prosecution, and his testimony was offered as part of the government's case as against the defendants at trial. It mattered little that that witness was an accomplice witness under indictment in that very case. This Court specifically allowed his prior grand jury testimony because it "...directly contradicted the trial testimony of both government witnesses..." 419 F2d at 552.

In contrast, in our situation, co-defendant Orpheus testified solely on his own behalf. He was not called as a witness by either Drew or the government. Orpheus' trial testimony pertained solely to his own litigation with the government, as though it were a separate case.

We must recall at this point in the trial, the evidence between the government and Drew had been completed. The government had already rested its case, and Drew did not testify or offer testimony to any witness, and of course the government had no rebuttal witness against him. Orpheus' trial testimony had no bearing one way or the other on Drew's case. Orpheus' trial testimony was offered only to exculpate Orpheus and not to exculpate Drew. Furthermore, Orpheus' prior grand jury testimony was not inconsistent with his trial testimony. In his trial testimony Orpheus



was silent as to the items which had been raised in the grand jury testimony. The cross-examination of the government counsel does not show any inconsistency between Orpheus' trial testimony and his grand jury testimony. The United States Attorney wished only to refer to an item which had been discussed in the grand jury testimony, but was never raised in the trial testimony.

In this regard we submit that the rationale of De Sisto and its offspring was not designed to go that far. The rationale of De Sisto is to utilize inconsistent grand jury testimony so that potentially false testimony of a witness could not be used to his advantage or to the advantage of the party against whom it is received. That rationale is not necessary to a situation where the prior grand jury testimony is not inconsistent. Furthermore, the rationale is not necessary to a situation where the prior grand jury testimony involves only a third party or co-defendant.

Furthermore, a close reading of the cross-examination by government counsel (pages 6 and 7 of Drew's appendix), shows that the issue of payment was raised solely on cross-examination, and had not been raised initially on the direct examination of Orpheus. Furthermore, a close reading of the government's cross-examination of Orpheus (again pages 6 and 7 of Drew's appendix), shows that while the government asked Orpheus whether he had

given a particular answer to a particular question in the grand jury, the government never did ask Orpheus whether that answer was in fact truthful.

As such, in the particular context of this case, I submit that the government was erroneously allowed to utilize the prior grand jury testimony of Orpheus in a particularly, prejudicial and incriminating manner.

#### CONCLUSION

In the event that this Court reverses the conviction against Drew on Count Thirteen, but sustains it as to Count One, I do request that the case be sent back to the District Court for resentencing. The trial Court imposed a sentence on Drew only on Count One (six months imprisonment to be followed by two years probation). The District Court did suspend the imposition of sentence on Counts Seven through Thirteen inclusive.

Respectfully submitted,

H. ELLIOT WALES  
Counsel for appellant Drew

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

Index No.

UNITED STATES OF AMERICA,

Docket #75-1237

Plaintiff

against

AFFIDAVIT OF SERVICE  
BY MAIL

WILLIAM DREW,

Defendant

STATE OF NEW YORK, COUNTY OF

New York

ss.:

*The undersigned being duly sworn, deposes and says:*

*Deponent is not a party to the action, is over 18 years of age and resides at  
Queens, New York*

That on September 18th  
Reply Brief

1975 deponent served the annexed

on United States Attorney  
attorney(s) for Plaintiff

in this action at United States Courthouse, Annex, One St. Andrew's Plaza, New York, N.Y.  
the address designated by said attorney(s) for that purpose by ~~delivering~~ a true copy of same enclosed 10007  
in a postpaid properly addressed wrapper, ~~in a post office official depository under the exclusive care~~  
~~and custody of the United States Postal Service within the State of New York.~~ to a messenger employed  
by Mr. Messenger, of 103 Park Ave., New York City, for delivery on above attorney.  
Sworn to before me

this 18th day of September, 1975

The name signed must be printed beneath

Lillian Kurtzer

H. ELLIOT WALES  
NOTARY PUBLIC, STATE OF NEW YORK  
No. 24-4129915  
Qualified in Kings County  
Commission Expires March 31, 1976